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Special Counsel to Richard A. Marshack

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - SANTA ANA DIVISION

In re:
THE LITIGATION PRACTICE GROUP P.C.,
Debtor.

Case No.: 8:23-bk-10571-SC

Chapter 11

**MOTION FOR TURNOVER PURSUANT
TO 11 U.S.C. § 542(E); MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
TURNOVER PURSUANT TO 11 U.S.C. §
542(E); AND DECLARATION OF
RICHARD A. MARSHACK IN SUPPORT
THEREOF**

Date: January 31, 2024
Time: 1:30 p.m.
Judge: Hon. Scott C. Clarkson
Place: Courtroom 5C¹
411 W. Fourth Street
Santa Ana, CA 92701

¹ Video and audio connection information for each hearing will be provided on Judge Clarkson's publicly posted hearing calendar, which may be viewed online at: <http://ecf-ciao.cacb.uscourts.gov/CiaoPosted/?jid=SC>.

**TO THE HONORABLE SCOTT C. CLARKSON, UNITED STATES BANKRUPTCY
JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, THE DEBTOR, ASHLEE
COLONNA COHEN, ESQ., COLONNA COHEN LAW, PLLC, ALL SCHEDULED
CREDITORS AND THEIR COUNSEL OF RECORD, AND OTHER PARTIES IN INTEREST:**

On January 10, 2024, Richard A. Marshack, Chapter 11 Trustee (the “Trustee”) of the bankruptcy estate (the “Estate”) of The Litigation Practice Group, P.C. (“LPG” or the “Debtor”) in the above-captioned bankruptcy case (the “Case”), filed with the United States Bankruptcy Court, Santa Ana Division, located at 411 W. Fourth Street, Santa Ana, California 92701, the Honorable Scott C. Clarkson, United States Bankruptcy Judge, presiding, *Motion And Motion For Turnover of Records Pursuant To 11 U.S.C. § 542* (the “Motion”). The Motion is made pursuant to 11 U.S.C. § 542(e). Specifically, the Trustee seeks an order providing that:

1. All client files be turned over, including but not limited to names, contact information, client file management, communications, account information, letters, pleadings, discovery, communications, payment history, financial account information, credit reports, executed legal services contracts, ACH contracts, executed installment contracts, account balances, debts in dispute, payment history, file status, settlements, debt invalidations and/or any other information created, managed and stored electronically or physically related to Debtor and/or other aliases, agents or corporate entities affiliated with same; and

2. Such other and further relief as the Court deems just and proper is granted.

As set forth in the attached declaration of Richard A. Marshack (“Marshack Decl.”), the Trustee, by way of its special counsel, has contacted Ashlee Colonna Cohen, Esq. of Colonna Cohen Law, PLLC (“Cohen”) regarding its representation of Debtor and requested a copy of Debtor’s client files. Cohen has refused to produce said request. As of the filing of this Motion, the requested files have still not been turned over to Trustee.

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1 The Motion is based on the contemporaneously filed Notice of Motion, the Motion, the attached
2 Memorandum of Points and Authorities, the attached declaration of Richard A. Marshack, the pleadings
3 and records on file in this case and in related adversary proceedings of which the Court is requested to
4 take judicial notice and such other pleadings and evidence as may be properly submitted in connection
5 with the Motion.

6
7 Dated: January 10, 2024

DINSMORE & SHOHL LLP

8
9 By: /s/ Yosina M. Lissebeck
10 Yosina M. Lissebeck
11 Christopher B. Ghio
12 Christopher Celentino
13 Special Counsel to Richard A. Marshack,
14 Chapter 11 Trustee
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Richard A. Marshack, Chapter 11 Trustee (the “Trustee”) of the bankruptcy estate (the “Estate”) of The Litigation Practice Group, P.C. (“LPG” or the “Debtor”) in the above-captioned bankruptcy case (the “Case”), submits this Memorandum of Points and Authorities, through his undersigned counsel, in support of his motion (the “Motion”) for an order under 11 U.S.C. § 542 for Ashlee Colonna Cohen, Esq. of Colonna Cohen Law, PLLC (“Cohen”) to turnover all LPG client files, documents and records maintained as described herein. The Bankruptcy Code is clear: any party in possession of property of a bankruptcy estate must turn over such property to the Trustee. Property of the estate includes “all legal or equitable interests of the debtor in property as of commencement of the case.” Further, 11 U.S.C. § 542(e) provides that after notice and a hearing, the “court may order an attorney, accountant, or other person that holds recorded information, including books, documents, [or] records . . . relating to the debtor’s property or financial affairs, to turn over or disclose such recorded information to the trustee.”

Here, the Trustee, through his legal counsel, formally asked Ms. Cohen to furnish the LPG client files she currently holds pertaining to several litigation cases for which she served as the attorney of record for LPG. As of the date of filing this Motion, she has not turned over those files.

II. STATEMENT OF FACTS

On March 20, 2023, the Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”), in the United States Bankruptcy Court for the Central District of California (the “Court”).

On May 4, 2023, the Court entered the *Order Directing United States Trustee to Appoint a Chapter 11 Trustee* [Docket No. 58], and on May 8, 2023, the Trustee filed his *Acceptance of Appointment as Chapter 11 Trustee* [Docket No. 63]. See, Attached Declaration of Richard A. Marshack (“Marshack Decl.”), ¶ 3. Since his appointment, the Trustee has served in this capacity and has started his investigation of the Debtor’s pre-petition business and transactions. See, Marshack Decl., ¶ 3.

Prior to Debtor filing the instant Case, Debtor was named as a defendant in the following cases: New York, Kings County Supreme Court case numbers 515748/2021; 527528/2021; and 531948/2021, and New York, Nassau County Supreme Court case numbers: 612800/2021; and 613095/2021

(collectively, the “New York Cases”). See, Marshack Decl., ¶ 4. Cohen represented Debtor as its defense counsel in the New York Cases. See, Marshack Decl., ¶ 5.

On or about October 26, 2023, counsel for Trustee, special counsel for the Trustee and Cohen had a conference wherein, *inter alia*, Cohen discussed her representation of Debtor and offered to provide Trustee’s counsel with information related to the New York Cases. Despite the offer to provide information in her possession in connection to Debtor and her representation of Debtor, Cohen never did.

On or about December 6, 2023, special counsel for the Trustee wrote as a follow up to the October 2023 conference, again requesting the information Cohen offered to provide in addition to the turnover of all of Debtor’s client files remaining in Cohen’s possession and control.

Cohen responded to special counsel’s email the following day requesting, in part, clarification on the documents and files sought. Special Counsel for the Trustee promptly responded to Cohen’s questions, yet Cohen did not provide the Debtor’s files and has not responded to subsequent follow up requests for the Debtor’s files.

On January 2, 2024, special counsel for the Trustee again emailed Cohen and requested turnover of the files, stating that if those were not provided a Motion would be filed. Cohen responded that she wanted information related to the administrative claim bar date and that she wanted to be retained by the Estate to do post-petition work. Counsel for the Trustee further responded that Cohen had received notice of the administrative bar date, provided Cohen with a drop box link so that she could easily provide the files, and requested those files by January 8th. Cohen responded she wanted a retainer agreement for the post-petition work, and that she would assert her lien rights. On January 8, 2024, special counsel wrote that regardless of her lien rights, she needed to turn over the client files.

As of the date of this Motion, Cohen continues to refuse to provide the requested client files. See, Marshack Decl., ¶ 9.

III. THIS COURT IS AUTHORIZED TO ISSUE AN ORDER TO TURN OVER ESTATE PROPERTY AND RECORDS PURSUANT TO 11 U.S.C. § 542.

In a turnover action under 11 U.S.C. § 542, the Trustee bears the initial burden to prove that property at issue is property of the estate and in the possession or control of the Debtor at the time the

turnover proceeding is commenced. *Yaquinto v. Greer*, 81 B.R. 870, 878 (N.D. Tex. 1988). For purposes of turnover, including attorney-client files, under 11 U.S.C. § 542, the Trustee need only show property is property of the estate by a preponderance of the evidence as opposed to clear and convincing evidence. Additionally, 11 U.S.C. § 542(e) authorizes a court to order an attorney that holds information relating to the debtor's financial affairs to turn over such information to the trustee.

§ 542(e) provides that:

Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

The language of § 542(e), and specifically "subject to any applicable privilege", is merely an invitation for judicial determination of privilege as the legislative intent was to "restrict, not expand" the ability of attorneys to withhold information from the trustee. *Commodity Futures Trading Com v. Weintraub*, 471 U.S. 343, 351 (1985). Moreover, the Supreme Court held that "the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications." *Id* at 358.

Turnover of client files and recorded information kept by a law firm is proper where, as here, the documents are part of the Debtor's Estate. *In re Jafroodi*, 2023 Bankr. LEXIS 1680, *35 (Bankr. C.D. Cal. 2023). In the instance of a legal file, the client has the right to the file and it is therefore "property" of the client, and upon his adjudication as a bankrupt, title passes to the Trustee. *In re Calestini*, 321 F. Supp. 1313, 1316 (N.D. Cal. 1971); *See also Ramirez v. Fuselier* (In re Ramirez), 183 B.R. 583, 588 (BAP 9th Cir. 1995) (Client files are part of the bankruptcy estate.)

Furthermore, upon request, an attorney has an ethical obligation to turnover files of its clients pursuant to the clients' request. California Rule of Professional Conduct 1.16(e) provides an attorney, at the request of the client, shall promptly release to the client all client materials and property, and defines "client materials and property" as "correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not." Cal. Rules of Prof'l Conduct, Rule 1.16. Moreover, a Trustee stands in the shoes of a debtor. *Magana-Lopez*

1 *v. JPMorgan Chase Bank* (In re Magana-Lopez), 2012 Bankr. LEXIS 1689, *10 (Bankr. C.D. Cal. 2012).
2 As such, the Trustee may request the Debtor's client files and the attorney has an obligation to turn them
3 over to the Trustee.

4 Here, Cohen served as counsel to Debtor in the New York Cases pursuant to court dockets and
5 Cohen's admissions. See, Marshack Decl., ¶¶ 4-6 & 8. While representing Debtor in its defense in those
6 cases, Cohen would have obtained critical information regarding Plaintiff's alleged security interests and
7 potential insight of Debtor's property and finances and turnover of such is not only helpful but arguably
8 necessary for Trustee's administration of this Case.

9 Cohen initially offered to provide the requested information and files to Trustee's counsels yet
10 failed to do so. Even after multiple requests for Debtor's files thereafter, Cohen continues to refuse to
11 cooperate. The last request for the files was on or about January 8, 2024, wherein Trustee, via its special
12 counsel, requested Cohen produce copies of all of Debtor's client files, including the files in connection
13 with specifically identified court cases wherein Cohen appeared on behalf of Debtor. See, Marshack
14 Decl., ¶ 7. Cohen has not denied she represented Debtor yet as of the date this Motion was filed has
15 refused to turnover said files. See, Marshack Decl., ¶ 8-9. As it is established by the aforementioned
16 precedent, there is no privilege preventing Cohen from turning over the files and even if there was,
17 Trustee, in the shoes of Debtor, is permitted to waive such. See, Marshack Decl., ¶ 13. Furthermore,
18 Cohen is breaching her ethical obligation to turn over former client files upon request.

19 The Trustee seeks turnover of Debtor's client files currently in the possession of Cohen for the
20 purposes of better assessing Debtor's estate and administering this Case. See, Marshack Decl., ¶¶ 10 &
21 11. The Trustee hereby waives any applicable attorney-client privilege on behalf of Debtor to the extent
22 that this Court determines, based on the argument *infra*, that Cohen did, indeed, represent Debtor. See,
23 Marshack Decl., ¶ 13. Without this information, the Trustee's ability to administer this Case and to pursue
24 potential claims of the Estate is hindered. See, Marshack Decl., ¶ 11.

25 **IV. CONCLUSION**

26 For the reasons set forth above, the Court is respectfully requested to grant the Motion and enter
27 an order for turnover to the Trustee of the following:

- 28 1. All client files, including but not limited to names, contact information, client file

1 management, communications, account information, letters, pleadings, discovery, communications,
2 payment history, financial account information, credit reports, executed legal services contracts, ACH
3 contracts, executed installment contracts, account balances, debts in dispute, payment history, file status,
4 settlements, debt invalidations and/or any other information created, managed and stored electronically
5 or physically related to Debtor and/or other aliases, agents or corporate entities affiliated with same; and

6 2. Such other and further relief as the Court deems just and proper is granted.

7
8 Dated: January 10, 2024

DINSMORE & SHOHL LLP

9 By: /s/ Yosina M. Lissebeck

10 Yosina M. Lissebeck

11 Christopher B. Ghio

Christopher Celentino

12 Special Counsel to Richard A. Marshack,
13 Chapter 11 Trustee
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DECLARATION OF RICHARD A. MARSHACK

I, Richard A. Marshack, declare as follows:

1. I am the duly appointed Chapter 11 Trustee (“Trustee”) for The Litigation Practice Group, P.C. (the “Debtor” or “LPG”) in the above-captioned bankruptcy case (the “Case”). I am an equity partner at Marshack Hays LLP, and duly admitted to practice before all of the Courts in the State of California, United States District Court for the State of California and the United States Bankruptcy Courts for the State of California.

2. I have personal knowledge of the facts in this declaration and, if called as a witness, I could and would testify competently thereto. Capitalized terms not otherwise defined herein have the same meanings ascribed to them in the pleading to which this declaration is attached.

3. The Court may take judicial notice of the following:

(a) On March 20, 2023, the Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”), in the United States Bankruptcy Court for the Central District of California (the “Court”).

(b) On May 4, 2023, the Court entered the *Order Directing United States Trustee to Appoint a Chapter 11 Trustee* [Docket No. 58], and on May 8, 2023, I filed the *Acceptance of Appointment as Chapter 11 Trustee* [Docket No. 63]. Since my appointment, I have served in this capacity and have started the investigation of the Debtor’s pre-petition business and transactions.

4. Prior to Debtor filing the instant Case, Debtor was named as a defendant in the following cases: New York, Kings County Supreme Court case numbers 515748/2021; 527528/2021; and 531948/2021, and New York, Nassau County Supreme Court case numbers: 612800/2021; and 613095/2021 (collectively, the “New York Cases”).

5. Prior to Debtor filing the instant Case, Ashlee Colonna Cohen, Esq. of Colonna Cohen Law, PLLC (“Cohen”) represented Debtor as Debtor’s defense counsel in the New York Cases.

6. Based on court records and Cohen’s representations to my attorneys, Cohen served as counsel to Debtor in at least five New York state cases between 2021 and 2022 (the “New York Cases”).

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1 7. On or about December 6, 2023 and through January 8, 2024, my attorneys, corresponded
2 and requested Cohen produce copies of all of Debtor's client files, including the files in connection with
3 the New York Cases wherein Cohen appeared on behalf of Debtor.

4 8. Cohen did not deny she represented Debtor in the New York Cases.

5 9. As of the date this Declaration was made, Cohen has not turned over the requested files.

6 10. The turnover of Debtor's client files currently in the possession of Cohen will help me in
7 further assessing Debtor's estate and administering this Case.

8 11. Without this information, my ability to administer this Case and to pursue potential claims
9 of the Estate is hindered.

10 12. As the Trustee, I am permitted to waive any attorney-client privilege of LPG.

11 13. I hereby waive any applicable attorney-client privilege on behalf of Debtor.

12 I declare under penalty of perjury under the laws of the United States of America that the
13 foregoing is true and correct.

14 Dated: January 10, 2024



Richard A. Marshack

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 655 W. Broadway, Suite 800, San Diego, California 92101

A true and correct copy of the foregoing document: **MOTION FOR TURNOVER PURSUANT TO 11 U.S.C. § 542(E); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TURNOVER PURSUANT TO 11 U.S.C. § 542(E); AND DECLARATION OF RICHARD A. MARSHACK IN SUPPORT THEREOF**

will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On January 10, 2024, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☒ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On January 10, 2024, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on January 10, 2024, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

JUDGE'S COPY - VIA FEDEX

The Honorable Scott C. Clarkson
United States Bankruptcy Court
Central District of California
Ronald Reagan Federal Building and Courthouse
411 West Fourth Street, Suite 5130 / Courtroom 5C
Santa Ana, CA 92701-4593

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

January 10, 2024
Date

Caron Burke
Printed Name

/s/ Caron Burke
Signature

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):**

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